Supreme Court, U.S.
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No. 98-1127

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center,

Petitioner,

vs.

KEITH A. SMITH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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Why This Case Presents An Important Question Of Federal Law That Has Not, But Should Be, Settled By This Court

Respondent contends that this issue should not be reviewed because there is not split in the Circuits on this issue. Petitioner never asserted that there was a split, in fact petitioner is not aware of any other Circuit Court that has decided this issue.

Moreover, while respondent alleges numerous lower court opinions have sided with the Eighth Circuit Court of Appeals on this issue, respondent relies on opinions from District Courts. Respondent cites to no Circuit Court opinion that has held the one year statute of limitation period begins once this Court declines discretionary review instead of beginning at the conclusion of direct review by the state courts.

Respondent's citation to District Court opinions that have held §2244(d)(1)(A) provides an opportunity to file a petition for writ of certiorari demonstrates why this is an important question of federal law that has not, but should be, settled by this Court. If the District Courts continue to reject the position advanced in the present petition and denies a petition for writ of habeas corpus on the merits, the present issue will never be decided by this Court. Only when a District Court rejects the position advanced in the present petition and grants the petition for writ of habeas corpus, or as in the present case were an interlocutory appeal has been taken, will this issue ever be ripe for review.

As discussed in petitioner's petition, if this Court declines to review this issue at the present time, but were to later agree with petitioner's position in a future case, inmates relying on the Court of Appeals decision, or the District Court decisions listed by respondent, will have their petitions dismissed as untimely. This is a significant issue given that the lower courts have declined to find that any state has met the opt-in provisions of 28 U.S.C. §2261.

Why Past Interpretation Of The Term "Direct Review" Does Not Control

Respondent contends that this Court's past interpretation of "direct review" controls how the term "direct review" in §2244(d)(1)(A) should be interpreted.

Simply because this Court in ***Bell v. Maryland***, 378 U.S. 226 (1964) held that direct review includes certiorari review does not mean that the term "direct review" in §2244(d)(1)(A) also includes the petition for writ of certiorari. Like this Court's holding in ***Teague v. Lane***, 489 U.S. 289 (1989) and ***Caspari v. Bohlen***, 510 U.S. 383 (1994), this Court in ***Bell*** was deciding the issue of finality for retroactivity. ***Id.*** 378 U.S. at 232. Therefore, relying on cases that have held that "direct review", for the purpose of finality, includes the opportunity to file a petition for writ of certiorari under §2244(d)(1)(A) was erroneous.

Why Congress Did Not Intend The Term "Direct Review" To Include The Opportunity To File A Petition For Writ Of Certiorari

Respondent contends that the Court of Appeals interpretation "comports" with the congressional intent behind the Antiterrorism and Effective Death Penalty Act of 1996.

In support of this position respondent refers to a law review article that opines that including the opportunity to file a petition for writ of habeas corpus as part of the "direct review" of §2244(d)(1)(A) is a "reasonable interpretation." However, simply because a scholar believes one "reasonable interpretation" of the statute includes the opportunity to file a petition for writ of certiorari does not end this analysis.

The Court of Appeals did not conduct a statutory interpretation of §2244(d)(1)(A) and respondent may not substitute a law review article in its absence. Because the Court of Appeals did not conduct a statutory interpretation of §2244(d)(1)(A), this Court should grant certiorari in order to resolve this significant issue that has not been addressed by this Court, but should be in this case.

CONCLUSION

Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that court.

Respectfully submitted,

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